

No. 16,479 ✓

United States Court of Appeals
For the Ninth Circuit

FRANK FILICE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

BRIEF OF APPELLEE.

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FILED

JUL 27 1959

PAUL P. O'BRIEN, CLERK

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JURISDICTION.

This court has jurisdiction of this appeal by reason of Title 28, United States Code, Section 1291 and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

This is an appeal from an order of the United States District Court for the Northern District of California made and entered on March 30, 1959, dismissing with prejudice appellant's "Complaint for Damages from Date of Trial." The complaint was

dismissed because it showed on its face that the cause of action for which relief was sought had been adjudicated in a prior lawsuit by a money judgment in favor of the appellant.

Appellant's brief pages 5 to 7 refers to certain judicial proceedings that occurred in the year 1952 in Civil Action No. 30854 of the United States District Court for the Northern District of California. This earlier action was instituted under the Federal Tort Claims Act for personal injuries sustained by the plaintiff. In Civil Action No. 30854 of the United States District Court for the Northern District of California appellant received judgment of \$15,000 against the United States of America, the appellee here. This judgment was entered on June 12, 1952.

The complaint which is the subject of this appeal was filed in Civil Action No. 34505 of the United States District Court for the Northern District of California which was originally instituted on March 11, 1955. The pleading which is the sole subject of this appeal was the last of several proceedings initiated by the appellant in an attempt to secure further and additional damages for the injuries for which he was awarded \$15,000 on June 12, 1952, in Civil Action No. 30854.*

Excerpts of the docket entries revealed that the second proceeding was initiated by the appellant approx-

*For the purpose of clarity and distinction, the appellee will hereafter refer to Civil Action No. 30854 which resulted in the \$15,000 judgment as the first proceeding, and Civil Action No. 34505 initiated on March 11, 1955, as the second proceeding.

imately 33 months after he secured his \$15,000 in the first proceeding. In his second proceeding appellant sought to have the \$15,000 awarded to him in the first proceeding set aside for the reason that it was secured by fraud. This purported fraud consisted of appellant's medical expert Dr. W. Henry Harper's giving alleged perjurious testimony at the time of trial of the first proceeding as to the full nature, extent and permanency of Mr. Filice's personal injuries.

In his second proceeding the appellant contended that the so-called fraud that purportedly occurred during the trial of the first proceeding prevented the court from being fully advised as to the exact extent of his injuries and thus resulted in his being awarded damages that were inadequate and not commensurate with his physical disabilities.

The records in the first proceeding will disclose that this so-called charge of fraud, perjury or misrepresentation, however characterized, was brought to the attention of the trial judge through appellant's motion to vacate the judgment of June 12, 1952, which was filed in the first proceeding on August 1, 1952. This motion was denied by the trial judge. The records in the first proceeding show that prior to the inception of the second proceeding a certificate of settlement from the General Accounting Office dated March 31, 1953, bearing claim No. Z 1353876 was issued indicating the payment to the appellant of the \$15,000 judgment of June 12, 1952.

After initiating the second proceeding seeking to set aside the judgment of the first proceeding on the

grounds that it was procured by fraud, the United States of America, the appellee here, moved to dismiss the complaint or in the alternative for a more definite statement. Appellee's motion to dismiss was denied on July 5, 1952, but its motion for a more definite statement was granted. Thereafter on August 7, 1955, appellant filed an amended complaint again seeking to set aside the judgment in the first proceeding on the same grounds that it was secured by fraudulent testimony. Appellee for the second time moved to dismiss the amended complaint which motion was granted on October 3, 1956; an order of dismissal was entered on that day. Appellant never appealed the court's order of October 3, 1956, dismissing his complaint. Further no appeals except the instant appeal have ever been initiated by the appellant with respect to any proceeding, orders or judgment entered in the first or second proceedings.

Following the dismissal of the complaint to set aside the judgment of the first proceeding the appellant did nothing until September 19, 1957, when he filed the complaint which is in issue in this appeal. Service of this pleading was not effected upon the appellee until December 22, 1958, 14 months after the complaint was filed with the Clerk of the United States District Court for the Northern District of California. After service upon the United States of America of the appellant's so-called "Complaint for Damages from Date of Trial" a motion to dismiss was filed by appellee which was argued on March 2 and 4, 1959. United States District Judge George B.

Harris granted the government's motion to dismiss on March 30, 1959. This is the order which is now being appealed.

ARGUMENT.

Despite appellant's uncorroborated charges of irregularities during the trial of the first action, the only issue to be determined by this appellate tribunal is the propriety of the District Court's order of March 30, 1959, dismissing with prejudice the appellant's "Complaint for Damages from Date of Trial."

Appellant in his brief devotes a majority of his argument and so-called specifications of errors to the perjurious and fraudulent testimony given at the trial of the first proceeding, to collusion and conspiracy between his counsel and government attorneys in precluding the doctor from making a full disclosure of appellant's injuries at the time of trial of the first proceeding and so-called falsification of a trial transcript by an official certified court reporter of the United States District Court for the Northern District of California.

A review of the records of the two proceedings will readily disclose that all of these charges have long since been adjudicated by the United States District Court for the Northern District of California. The allegations of fraud, conspiracy and falsification of the trial transcript were before the trial judge in the first proceeding on appellant's motion to vacate the judgment which was heard on August 12, 1952. The

motion was denied. Again in the second proceeding these charges were brought to fore in the plaintiff's complaint and amended complaint to set aside the judgment in the first proceedings. This complaint was dismissed with prejudice by the United States District Court on October 3, 1956. As already mentioned, no appeals were ever taken from these two orders and the question raised in those proceedings are now moot and not subject to consideration or review in this appeal.

A review of the docket entries in both the first and second proceedings and the allegations in the "Complaint for Damages from Date of Trial" indisputedly disclose the correctness of Judge Harris' order of March 30, 1959. It is beyond question that the purpose and purport of the appellant's complaint was an attempt on the part of Mr. Filice to secure additional and further damages for the injuries which he had been previously compensated by a \$15,000 judgment in June, 1952.

As a matter of law the District Court was correct in its order of March 30, 1959, in holding that this "pleading" stated a cause of action that had heretofore been adjudicated. The law on this subject is well established. A litigant can have only one recovery for one wrong suffered. The appellant has had his day in court and has been compensated.

In urging affirmance, the appellee relies particularly upon this court's decision in *Miller v. Spokane International R. Co.*, 293 Fed. 748, 750, wherein it was held:

“Where there is a single tort and an entire claim is interposed to recover damages for the tort, all the various items which are relied upon to sustain the allegations of damages * * * must be included in an action in which the injured person seeks to recover. * * * and all the damages which result from a single tort form an indivisible cause of action.”

With respect to the legal principle in issue in this appeal attention is directed to the California Code of Civil Procedure, Section 1908(2) which is applicable in this instance as this case was instituted under the Federal Tort Claims Act for an accident which occurred in the State of California (28 U.S.C. 1346(b)). Section 1908(2) states:

“The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

“In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.”

The California Supreme Court in *Panos v. Great Western Packing Co.*, 21 C. 2d 636, enunciated the well established principle that a prior judgment in a

tort action operates as a bar to a second action on the same incident and the prior judgment concludes not only every matter which was but also every matter which might have been urged in support of the initial claim. This ruling was based upon the doctrine of res judicata.

In the *Panos* case, the California Supreme Court states:

“The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation. In applying the doctrine the cases recognize a distinction between the effect of a judgment operating by way of estoppel in a later action upon a different cause of action and one operating by way of bar against a second action upon the same cause of action.

Dillard v. McKnight, 39 Cal. 2d 209, held:

“It rests upon the sound public policy that there must be an end of litigation and accordingly, persons who have had one fair trial on an issue may not again have it adjudicated. * * * So it is stated as ‘an elementary principle, recognized by [our] code [Code Civ. Proc., Sec. 1908, Subd. 2], that a judgment or order is operative not only upon parties but to the same extent upon their privies.’ ”

See also,

Wellman v. Security First National Bank, 108 Cal. App. 2d 254, 265; *Todhunter v. Smith*, 219 Cal. 690, 695; *Freeman on Judgments*, 5th Edition, Sections 598 and 599; 69 ALR 1004; 64 ALR 663.

CONCLUSION.

Appellee respectfully submits from the law cited herein and from the factual history of the two proceedings as set forth in the docket entries the pleading and orders that constitute the transcript of record in this appeal, this appellate proceeding is without merit; that the District Court by its order of March 30, 1959, did not err in entering a dismissal with prejudice of plaintiff's "Complaint for Damages from Date of Trial" and that order should be affirmed by this court.

Dated, San Francisco, California,
July 20, 1959.

Respectfully submitted,
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